

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
DALLAS DIVISION**

BLUE RACER MIDSTREAM, LLC,	§	
	§	
Plaintiff,	§	
	§	
v.	§	Civil Action No. 3:16-CV-3296-K
	§	
KELCHNER, INC.,	§	
	§	
Defendant	§	

**MEMORANDUM OPINION AND ORDER**

Before the Court is Defendant Kelchner, Inc.’s Motion for Leave to Designate Responsible Third Party and Brief in Support Thereof (Doc. No. 56). After carefully considering the motion, the record, and the applicable law, the Court **DENIES** Kelchner, Inc.’s motion because Kelchner’s designation is inapplicable to the contract-based claims and because Kelchner agreed to indemnify Blue Racer Midstream, Inc. (“Blue Racer”) for the negligence of retained third parties.

Kelchner, Inc. (“Kelchner”) cannot use Chapter 33 of the Texas Civil Practice and Remedies Code to avoid liability on Blue Racer’s contract-based claims. Texas courts have found that Section 33.002, allowing for the designation of responsible third parties, “applies exclusively to actions based in tort or brought under the DTPA, so a defendant cannot designate a responsible third party with respect to a *contract* claim against him.” *Nels Cary, Inc. v. Day*, Civ. Action No. 3:07-CV-0832-D, 2008 WL 631242, at \*2 (N.D. Tex. Feb. 29, 2008) (Fitzwater, C.J.); *see also* TEX. CIV.

PRAC. & REM. CODE § 33.002. Thus, Kelchner cannot designate ProFoam, LLC (“ProFoam”) as a responsible third party as to the contract-based claims.

Similarly, designating ProFoam as a responsible third party on the negligence-based claims is inappropriate. In the Master Service Agreement (“MSA”) between Blue Racer and Kelchner, Kelchner agrees to indemnify Blue Racer against any damages incurred by a third party subcontractor. Because Kelchner retained ProFoam, Kelchner is responsible to Blue Racer for any damages ProFoam allegedly caused. Kelchner cannot avoid its contractual obligations by designating ProFoam as a responsible third party.

Because Kelchner cannot designate ProFoam as a responsible third party on the contract based claims and because Kelchner agreed to indemnify Blue Racer for the negligence of retained third parties, the Court **DENIES** Kelchner’s motion for leave to designate ProFoam as a responsible third party.

**SO ORDERED.**

Signed on May 8<sup>th</sup>, 2018.

  
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UNITED STATES DISTRICT JUDGE